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No. 94-780

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Capital Square Review and Advisory Board,
Ronald T. Keeler, Daniel Shellenbarger
and Senator Richard H. Finan

Petitioners,

v.

Vincent J. Pinette, Donnie A. Carr,
and Knights of the Ku Klux Klan,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

REPLY BRIEF OF PETITIONERS

BETTY D. MONTGOMERY
Ohio Attorney General

MICHAEL J. RENNER
Chief Counsel
(Counsel of Record)
CHRISTOPHER S. COOK
ANDREW S. BERGMAN
SIMON B. KARAS
Assistant Attorneys General
30 East Broad St., 17th Fl.
Columbus, Ohio 43215-3428
(614) 466-5026
Attorneys for Petitioner

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ARGUMENT

I. RESPONDENTS IMPLICITLY CRITICIZE THE COURT BELOW AND MISAPPLY THE ENDORSEMENT TEST.

Apparently recognizing the infirmity of the Sixth Circuit's *per se* holding, Respondents' attempt to recast the decision below as something other than a *per se* rule by describing it as an individualized finding based only on the unique facts of this case. Resp. Br. 26-27. This position is remarkable for at least two reasons. First, Respondents, by advocating for a fact specific standard, depart from the analysis of the court below which clearly held that private speech in a public forum cannot violate the Establishment Clause. Second, Respondents now appear to fully embrace the endorsement test as the appropriate approach to resolving Establishment Clause cases, even though such a test, when fully analyzed, demonstrates that the Establishment Clause would be violated by allowing the cross as Respondents seek herein.

A. Fact Specific Inquiry

Simply saying that the court below applied a fact specific standard does not make it true. A plain reading of the lower court's opinion reveals the court applied a *per se* rule: "a private organization's unattended display of a religious symbol in a public forum does not violate the Establishment Clause." *Capitol Square Review and Advisory Board v. Pinette*, 30 F.3d 675, 679 (6th Cir. 1994), Appendix to the Petition for Writ of Certiorari ("App.") at A8. Respondents' implicit criticism of the lower court's holding is consistent with the position of Petitioners: the court below went too far in finding that the public forum doctrine trumps the Establishment Clause. As its concluding

thought, for example, the court below flatly asserts that "[i]n a public forum, the religious content of private speech is *absolutely irrelevant* for First Amendment purposes." *Id.*, 30 F.3d at 680, App. A12 (emphasis added). According to the Sixth Circuit, the Establishment Clause can never be implicated by private religious speech in a public forum.

The claim that the religious content of private speech is irrelevant contradicts the premise of the endorsement test itself. If governmental actions violative of the Establishment Clause take place on governmental property, not a public forum, the same governmental actions on government property which is a public forum would likewise violate the Establishment Clause. Similarly, if actions are perceived to be government endorsement which take place in a nonpublic forum (e.g., creche in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989)), then the same actions in a public forum would be violative of the Establishment Clause, if also perceived to be government endorsement. The issue, for endorsement test purposes, is whether the display conveys a message of government endorsement, not whether the display is on a public or nonpublic forum.

Respondents attempt to criticize Petitioners on the same ground that Petitioners have criticized the decision below. While denying that the Sixth Circuit adopted a *per se* rule, Respondents characterize Petitioners position as advocating a *per se* rule that finds an "automatic violation" of the Establishment Clause. Resp. Br. 26. Respondents confuse and mischaracterize the test used by Petitioners with the conclusion reached. Petitioners' position is that placing a cross in front of the Statehouse meets any of the tests adopted by this Court, including the endorsement test with its fact specific approach. The rule suggested by Petitioners is simply the conclusion reached when one examines the fact of an unattended purely religious symbol in front of the seat of

government. Petitioners' position takes into account the relevant facts, but in a way that does not force courts to engage in the "jurisprudence of minutiae." *County of Allegheny*, 492 U.S. at 674 (Kennedy, J., concurring in the judgment in part and dissenting in part). The fact is that the cross is this nation's most, if not the world's most, recognizable purely religious symbol. The fact is that the front grounds of the Ohio state capitol is where the government has erected its state supported unattended displays, both permanent (numerous statues and flags) and temporary (Christmas seasonal displays, United Way exhibit). The fact is that these grounds have no history of private unattended displays, only government sponsored unattended displays. With these facts, the risk of misperception as to the sponsor of the display is at its greatest degree. A court is presented, then, with the significant possibility that an observer will consider the display supported by the government, resulting in an inevitable clash with the Establishment Clause.

B. Formulation of the Endorsement Test

The Sixth Circuit held that "the Establishment Clause forbids only religious speech sponsored by the government, so 'truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer.'" *Pinette*, 30 F.3d at 679, App. A9 (quoting *Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1993) (en banc)) (emphasis in original). The Establishment Clause, however, also forbids religious speech *perceived by the reasonable observer* to be sponsored by the government. Contrary to Respondents' contention, the Sixth Circuit did not take all the relevant facts into account because it did not adequately formulate the inquiry. Even Respondents concede that a reasonable observer can perceive government endorsement when the

religious speech is private and in a public forum. *See* Resp. Br. 43. ("[O]n a different set of facts, the government might be found guilty of violating the endorsement test by permitting a private religious display in a public forum.") In order to find that a reasonable observer would not perceive government endorsement under the circumstances of the instant case, however, Respondents posit an omniscient observer who is aware of all the surrounding facts and circumstances, including (a) that the Latin cross "was not part of any state approved display," (b) that the Latin cross as used by Respondents "is one of the most unpopular symbols in American History," (c) that the Latin cross "was accompanied by a sign explicitly characterizing it as a private display," and (d) that "Ohio officials did everything in their power to exclude [the Latin cross] from government property." Resp. Br. 30.

By presenting their argument from the perspective of an omniscient observer, however, Respondents' undercut their own position. Although Respondents claim to accept the endorsement test as the appropriate approach to resolving Establishment Clause cases, Resp. Br. 43, they have returned to the *per se* position of the Sixth Circuit by considering Establishment Clause questions from the perspective of the omniscient observer. Respondents' endorsement test, then, really is no test at all; government cannot endorse or appear to endorse religion if the observer knows for a fact that the religious display was private. Under Respondents' test, the creche in *County of Allegheny* would have been upheld because the all-knowing observer would know that the display was private and was only allowed by the government to express tolerance and celebrate plurality.

Respondents conclude that an Establishment Clause violation could be found "if there were evidence that the government was intentionally giving preferential prominence

to a religious display in a public forum." Resp. Br. 43. In essence, then, Respondents do not really articulate an endorsement test, but rather a proselytizing test because the only time Respondents would find an Establishment Clause violation is if the government placed its "weight behind an obvious effort to proselytize on behalf of a particular religion." *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part). The instant case would present a violation of the Establishment Clause even under the proselytizing test as discussed in Petitioners' initial brief.

Furthermore, Respondents' omniscient observer simply does not exist as a real person or as a useful construct of real world people. Respondents' position is an unrealistic legal fiction that does not take real world considerations into account. Any Establishment Clause test should be workable and realistic; Respondents' test is neither. For every constitutional scholar with an unbridled drive to seek out the truth about all displays on the Statehouse grounds, there are literally hundreds who drive by the Statehouse everyday giving displays only a quick glance, who have read only the sports page in the last month and prefer Hard Copy to CNN. Respondents' conclusion that there are only two groups of people, omniscient observers (those whom Respondents would call reasonable) and "hypothetical dolts" and "ignoramuses" whose views are not worthy of consideration for endorsement test analyses, is unrealistic. Most people live between those two extremes. There are reasonable people that do not know a "Klan cross" from a Methodist cross or that a "Klan cross" carries a message of rallying against tyranny derived from fourteenth century Scotland. There are reasonable people such as Respondents' own witness at trial who believed that the unattended United Way display at the Statehouse (a private display at a public forum) signaled government approval of United Way. JA 161.

Categorizing reasonable observers as those who know all the facts and any other observers as "hypothetical dolts" without evidentiary analysis to disprove that such a category, under the circumstances of this case, might include a majority of this country's citizens is to do away with the endorsement test altogether by relegating those who perceived the cross as approved by the government to be statistically insignificant and not reasonable.

One of Respondents' *amici* criticizes Petitioners for considering Establishment Clause issues from the perspective of an alleged "subjective observer." Br. *Amicus Curiae* Christian Legal Society 21-28. In contrast to the hyper-sophisticated observer perspective presented by Respondents and the court below, however, Petitioners offer this Court the objective perspective of just what an unattended purely religious symbol sitting by itself right in front of the seat of government would mean to a person of ordinary knowledge and intelligence. This reasonable observer can be properly analogized to the "reasonable man" who serves as the community standard in the common law of torts. As such, the reasonable observer constitutes a rather idealized version of the ordinary citizen, who has ordinary experience and knowledge. This reasonable observer would not be a "hypothetical dolt," nor an idealized all-knowing individual, but someone that accurately represents a cross-section of society.

The unworkability of Respondents' omniscient observer test is evident from the "facts" Respondents rely on. None of these facts even if true go to the "objective" meaning of the display, the sensible perspective of many of the observers viewing the display. As Justice O'Connor explained in *Lynch v. Donnelly*, 465 U.S. 668 (1984):

> The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent by, for example, examining the context of the statement or asking questions to the speaker. Other listeners do not have or will not seek access to such evidence of intent. *They will rely instead on the words themselves; for them the message actually conveyed may be something not actually intended.* If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.

Id., 465 U.S. at 690 (O'Connor, J., concurring) (emphasis added). The message actually conveyed by the display, therefore, depends on viewing the display in and of itself and may differ from the intended message. Indeed, when the speech is in the form of an unattended display where no words are spoken and no body language conveyed, the speech *is* that which is perceived by the observer.

Respondents, thus, confuse the meaning of the Latin cross by attempting to substitute their subjective intent for the

objective perspective of the reasonable observer. Regardless of what message Respondents intended to convey with the display, the objective meaning of the display as a purely religious symbol standing alone would create the message of government endorsement. The messages Respondents wish to communicate, thus, cannot determine the Establishment Clause analysis.

While there may have been gatherings, rallies, and speeches on the Capital Square, unattended displays have been rare, and have all been government approved. It would not be evident from the objective perspective of the reasonable observer, therefore, that the Latin cross was not a government approved display. After all, it appears right in front of the Statehouse itself. Indeed, the unrebutted testimony in this case was that an actual well-informed observer called to offer testimony on behalf of Respondents was inclined to conclude that if the State of Ohio knowingly permitted an unattended display to remain upon the Capitol Square for any length of time, the presence of that display would lead that observer to infer that the government "was in support of the activity." JA 161.

Nor would the reasonable observer be expected to know that the plain, white Latin cross he was viewing was a "Klan cross." Without more information than that gleaned from objectively viewing the display, the reasonable observer would not consider the display an unpopular symbol at all, but in fact a symbol with a profoundly popular and purely religious meaning. To millions of Christians, the message of the Latin cross is that described by St. Paul in his first letter to the Corinthians: "For the message of the cross is foolishness to those who are perishing, but to us who are being saved it is the power of God." 1 *Corinthians* 1:18, NIV. These members of the majority religion would be surprised to learn that their sacred symbol standing by itself

was "generally understood to express views of racial supremacy." Resp. Br. 30 n.9.

Furthermore, the explanatory sign was ineffective as a means of separating the government from the display's message to all but the most determined observers who (a) could see from their vantage point that there was a sign, (b) would tramp across the statehouse lawn, and (c) could read and understand the sign. This cannot be the objective perspective of the reasonable observer, many of whom would be driving by the display or viewing it from afar.

Finally, the reasonable observer, a composite that must include children and visitors alike, could not be expected to be aware of the government's opposition to the display. Many observers cannot or will not examine the context of the display, cannot ask questions of a speaker who is not present, and so will rely on simply viewing the display itself to interpret its message. *See Lynch,* 465 U.S. at 690 (O'Connor, J., concurring). Furthermore, according to Respondents, the act of government opposition was an element which raised the level of knowledge of an observer and therefore helped to separate Petitioners and the cross. Respondents' argument presents a "catch 22" to Petitioners. If Petitioners' opposition is a factor in whether a court will find an Establishment Clause violation, a private cross display would be found to violate the Establishment Clause if Petitioners permit it, but it would pass Establishment Clause scrutiny if Petitioners forbid it. This places Petitioners in an unacceptable dilemma; if Petitioners want the cross legally erected, they deny the application, but if they want it off government property, they approve the permit.

Respondents misconception of the reasonable observer is most evident from their discussion of the significance of

the menorah and the Latin cross. Resp. Br. 32-35. Respondents ignore pronouncements by members of the Court on the secular as well as religious meaning of the menorah. *See County of Allegheny*, 492 U.S. at 582-87 (Blackmun, J.; joined by O'Connor, J., and Stevens, J.); *id.* at 665 (Kennedy, J., concurring in judgment in part and dissenting in part; joined by Rehnquest, C.J., White, J., and Scalia, J.). It is disingenuous for Respondents to assert now, knowing the position of members of the Court and even stipulating to the very fact that the menorah has "secular significance," JA 98, that Petitioners "inappropriate[ly] insist[ ] on defining the menorah as a secular symbol." Resp. Br. 34.

Respondents' attempt to downplay Establishment Clause concerns only emphasizes the weakness of their position. The perception of the reasonable observer is shaped to a significant extent by the display itself. The message of the cross is not only a message unmistakably and purely religious, it is a message which proselytizes to the highest degree. It is a message which says that belief in the death and resurrection of Jesus Christ is necessary for eternal salvation. When placed on the grounds of the state government, the message is that the government encourages its citizens to seek salvation through Jesus Christ.

Respondents suggest, without support of evidence in the record, that reasonable observers would receive from their cross a meaning of liberty and other political concepts. This would be a surprise message to the millions of adherents who hear only St. Paul's words that salvation comes from Jesus' death on the cross to atone for the sins of mankind when viewing a simple Latin cross. It also would be a surprise to millions of nonadherents who hear the same proselytizing message. Surely Respondents do not want this Court to hold that the many adherents and nonadherents who

hear only the proselytizing message of St. Paul when they view the cross, and not the message which the Klan alleges it intended to convey, are "ignoramuses."

No matter how well informed a reasonable observer is expected to be, there are more reasonable people who understand the proselytizing message of the cross, and more reasonable people who know the power of government and the ownership of the front lawn of the capitol, than there are people who know that Respondents erected the cross and wished to communicate some kind of political meaning. To suggest that all reasonable viewers of the cross displayed in this case would receive a political message sent by the Klan rather than a salvation message endorsed by the government exceeds the evidence of this record and logical understanding of human nature.

Respondents further criticize Petitioners for treating religious speech differently then nonreligious speech. By doing so, Respondents again reveal a fundamental misunderstanding of the issue before this Court. Contrary to Respondents' mischaracterization of Petitioners' position, Petitioners' do not argue that "the risk of a mistaken perception of endorsement *automatically* exists for unattended religious displays when it does not exist for private unattended displays of other kinds." Resp. Br. 42 (emphasis in original). Indeed, Petitioners argue the converse; the risk of a mistaken perception of government endorsement always exists for any unattended display positioned right at the seat of government. The appearance of endorsement is always present, but it is immaterial unless the appearance is constitutionally impermissible. And it is only constitutionally impermissible when the display is religious. In other words, no Establishment Clause concern arises unless the display is religious. If Respondents deem this different treatment of religious speech as discriminatory, it is because the

constitution mandates governmental restraint from establishing a religion whereas government is not constitutionally restrained from supporting other private actions.

II. A DISCLAIMER WOULD NOT EFFECTIVELY PROTECT PETITIONERS' INTEREST IN AVOIDING AN ESTABLISHMENT CLAUSE VIOLATION.

Respondents further criticize Petitioners for not taking "curative measures" such as posting disclaimer signs to "protect their legitimate interests." Resp. Br. 44. As pointed out in section V of Petitioners' initial brief, however, a disclaimer would be ineffective and pose its own set of Establishment Clause problems. Furthermore, the authority Respondents cite to support the notion that a disclaimer would be effective is inapposite. In *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) and *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court suggested that the use of disclaimers could clarify the sponsorship of the message, but in both cases the disclaimer was as perceptible as the message itself. Anyone receiving the message would at the same time receive the disclaimer in the same medium. In *FCC*, a station could broadcast the disclaimer every time it editorializes. 468 U.S. at 395. In *Robins*, a speaker or handbiller would be present to answer inquiries, and the owner of the shopping center could "post[ ] signs in the area where the speakers or handbillers stand." 447 U.S. at 87. Obviously, if every observer receiving the message communicated by the symbol of the Latin cross at the seat of government simultaneously received and understood the message in a disclaimer sign, the instant case would be analogous to *FCC* and *Robins*, and this Court could find the sign to be an effective means of negating the message of government endorsement.

The instant case, however, does not lend itself to the effective use of a disclaimer sign. Many observers, including those viewing the cross from afar or by driving by, would not even see the sign. Others, including the young, non-English speaking or illiterate, will not be able to understand the sign. These observers would rely on the objective perspective of the display without the benefit of the disclaimer's message, and would likely conclude that this display of the Latin cross right in front of the Ohio Statehouse represents government endorsement of Christianity.

III. RESPONDENTS' POLITICAL DISCRIMINATION CLAIM MISCHARACTERIZES THE SOLE LEGAL ISSUE WHICH PROVIDED THE BASIS FOR THE DECISIONS BELOW AND WHICH IS NOW BEFORE THIS COURT.

Just as they attempted in their Brief in Opposition to Certiorari, Respondents seek to recast this case as raising issues quite distinct from those expressly presented and considered in any of the proceedings below. Furthermore, Respondents recharacterize the sole issue presented to the Court in Petitioners' Petition For Writ of Certiorari and the sole issue on which the Court accepted this case. Respondents erroneously argue that this case should turn on issues of political discrimination and the Fourteenth Amendment when this did not provide the reasoning for any of the decisions below. These arguments, in fact, were dismissed by both the District Court and Court of Appeals as evidenced by their square holdings.

The District Court stated that the permit application came "from a private party to erect a *religious* symbol in

what is a traditional public forum. In light of these facts, it is difficult to conclude that permitting this display would constitute government endorsement of religion" in violation of the Establishment Clause. App. A24. (emphasis added). Similarly, the Court of Appeals expressly concluded that the same points were determinative: "Because Capitol Square is a public forum and the Klan's display of a Latin cross is private speech, a reasonable observer could not perceive the display at issue to be a government endorsement of religion. Therefore, we hold that the display does not violate the Establishment Clause and we affirm." App. A2. Furthermore, consistent with these holdings, the question presented for this Court's review in the petition for a writ of certiorari did not include an element of political discrimination. In light of the plain holdings below and the question presented to this Court, Respondents' efforts to recast this matter instead as a political discrimination case are simply unavailing and unpersuasive.[1]

Respondents' attempt to recast this case as one of discrimination requires a showing that Petitioners would have granted another group's application to erect a large, unattended Latin cross on Capitol Square. Respondents can make no such showing because no such evidence exists. The sole basis for Petitioners' refusal to allow the erection of the universally recognized symbol of Christianity directly in front of the Ohio Statehouse was their belief that to do so would violate the Establishment Clause. The December 3,

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[1] The sole passage in which any of the courts below even mentioned the Equal Protection Clause, in passing, was a quotation by the court below from this Court's decision in *Police Dep't of Chicago v. Moseley*, 408 U.S. 92 (1972), a labor-picketing case. That quotation, which appears in the court's peroration, did not provide the legal ground for decision in either the district court or the court of appeals.

1993, letter to Respondents denying their permit application specifically stated that the decision was made in a good faith attempt to comply with the dictates of the First Amendment to the United States Constitution. JA 47.

Respondents simply ignore the compelling interest that motivated Petitioners to deny Respondents' application. The unattended religious, distinctly sectarian symbol of Christianity displayed on Capitol Square constitutes a violation of the Establishment Clause regardless of the sponsor. The Court has expressly held that the avoidance of an Establishment Clause violation by the state may constitute a compelling governmental interest "justifying an abridgement of free speech otherwise protected by the First Amendment." *Lamb's Chapel v. Center Moriches School District*, ___ U.S. ___, 113 S. Ct. 2141, 2148 (1993) (citing *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)).

Respondents argue that Petitioners' denial of their application was an act of discrimination based upon Petitioners' desire to silence speech they found repugnant. Yet, this argument ignores the fact that Petitioners attempted to ban the Latin cross whose symbolic message is viewed favorably, not repugnantly, by millions of Americans. Moreover, Petitioners' denial of Respondents' application was not based upon any possible political meaning Respondents attribute to the Latin cross or upon Respondents' more general principles.[2] Rather, Petitioners denied Respondents' application because of the Latin cross' universal solitary message, salvation through Jesus Christ,

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[2] Interestingly, Respondents fail to mention that Petitioners in fact granted a permit application allowing Respondents to conduct a rally on Capitol Square on October 23, 1993. It was in the permitted rally, not the Latin cross, that Respondents' admittedly distasteful message was conveyed.

and the fact that display of this unattended symbol on Capitol Square sends this unmistakable message to the reasonable observer. Of all the elements of the general message of Respondents which might be perceived as repugnant to many of our nation, the cross is not one of them.

Furthermore, Respondents suggest that the display of a Latin cross by some other group may well violate the Establishment Clause whereas the display of their cross would not. This argument is inherently inconsistent; symbolic speech of the Latin cross remains identical regardless of its sponsor. As one *amici* supporting Respondents stated: "it is legally irrelevant to this case that the group displaying the cross is the Ku Klux Klan. The state officials do not claim power here to regulate speech that inflicts harms through racial, gender, or religious bigotry."[3] Petitioners have vigorously defended this position throughout these proceedings. For purposes of Establishment Clause analysis, the fact that Respondents here are the Ku Klux Klan is irrelevant and does not alter the constitutional inquiry.[4]

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[3] Br. *Amicus Curiae* Christian Legal Society 3. Moreover, this position squarely contradicts Respondents' political discrimination claim as it properly characterizes the correct factual and legal framework upon which Petitioners based their denial of Respondents' application and which formed the basis of the lower courts' holdings.

[4] The Court can readily imagine that, if Petitioners had allowed a church to put up a cross, another group would have brought an Establishment Clause challenge. Thus, if allowing a church to erect a cross was a violation of the Establishment Clause, the Court could not fashion a remedy for Respondents by requiring Petitioners to be involved in the same violation; the Court would first have to determine the permissibility of any private group to display a purely religious symbol at the seat of government.

Respondents' attempt to downplay the powerfully religious significance of the Latin cross is in stark contrast to the express testimony given by Respondents. In questioning by counsel for Petitioners, Respondent Carr testified that the symbol Respondents wished to erect was in fact a large Latin cross, Tr. of Dec. 20, 1993, Hearing p. 60, and that the cross is indeed a sacred symbol.[5] JA 142. In fact, Respondents' own uncontroverted testimony of their purpose in seeking to erect the Latin cross as "a symbol for our Lord, Jesus Christ", JA 173-175, in furtherance of their more general purpose to "establish a Christian government in America." JA 144-147. The irony in Respondents' contention that Petitioners have somehow singled them out for alleged discriminatory behavior is the undisputed fact that Respondents were the first group to utilize the Statehouse grounds to erect an unattended purely religious display such as the cross. Petitioners either had to accede to Respondents' admitted attempt to proselytize on behalf of Christianity in order to avoid a political discrimination case or Petitioners had to reject the cross on the basis of the Establishment Clause and face this very claim of political discrimination.

Respondents' argue that their equal protection claim is validated because Petitioners have allowed a menorah to be displayed in front of the Ohio Statehouse for several years in

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[5] *See also* Br. *Amicus Curiae* Liberty Counsel at App. A1 n. 3, stating that the Latin Cross "is appropriate the world over, and may be used by any religious body whose doctrines, include a confession of the Lord Jesus Christ and His atoning death." Importantly, all five *amici* briefs filed on behalf of Respondents are those of religious organizations. Apparently, these *amici* do not downplay the religious significance of the Latin cross as Respondents attempt. Nor did the ministers who in response to the cross at issue sought to display their own crosses to reflect their understanding of the cross' religious message.

conjunction with a Christmas tree as part of a holiday seasonal display. This contention completely ignores the fact that the Court's square holding in *County of Allegheny* compels the State of Ohio to permit the display of a menorah in this setting, in part because the menorah has both religious and secular significance when it is displayed contemporaneously with the Christmas Tree as part of the Christmas and Chanukah holiday season.[6] *See, e.g.*, 492 U.S. at 618 n. 68; *See also id.* at 665 (Kennedy, J., concurring and dissenting in part). In fact, several Justices in *County of Allegheny* expressed grave doubts about the propriety of any religious display of a cross -- which is not so associated with the holiday season -- in the very same setting. See *id.*, 492 U.S. at 629-30 (O'Connor, J., concurring); *id.*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part).

Furthermore, Respondents persistently refer to matters litigated in the hearing conducted on January 3, 1994, which dealt solely with whether to allow Respondents to conduct a rally on January 15, 1994. The Order which provided the sole issue for review by the Court of Appeals and by this Court was rendered on December 21, 1993 and required Petitioners to allow Respondents to erect a Latin cross on Capitol Square during the Christmas holiday season. It is obvious that no portion of the record from the January 3, 1994, hearing was relied upon by the District Court in its

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[6] Petitioners also were obligated to allow the menorah to be erected under the prevailing Sixth Circuit precedent at the time. *See Americans United* (holding that a privately funded menorah erected during the Chanukah season in a public forum did not violate the Establishment Clause).

ruling as the Court's Order was issued December 21, 1993.[7] Thus Respondents' references to matters litigated at the January 3, 1994, hearing are irrelevant. This is further evidenced by discourse between counsel for Petitioners and District Court Judge James L. Graham during the December 20, 1993, hearing when the District Court explicitly recognized that matters dealing with the State's denial of Respondents' request to conduct a rally on Capitol Square on January 15, 1994, were not relevant to their request to erect the Latin cross:

> Mr. Cordray: . . . as you have seen from our brief, our argument here, and our argument to Mr. Keller when he came to us for advice on denial of the permit or granting of the permit, was that we could not embroil ourselves in a violation of the establishment clause, and whether there is --
>
> The Court: So the state isn't saying that it's denied the permit to erect this cross during the Christmas season because the Klan had a demonstration in November and there was a disturbance or that the Klan had a demonstration in November and we sent them a bill for the cost of it and they didn't pay it. Neither of those are asserted as grounds for the denial of the permit to erect the cross, is that correct?
>
> Mr. Cordray: That is correct, Your Honor....

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[7] Petitioners did not appeal the Order rendered by the District Court on January 4, 1994, relating solely to the rally issue.

Tr. of Dec. 20, 1993, Hearing p. 18-19.

Petitioners provided but one legal reason for denying Respondents' request to erect a large unattended Latin cross directly in front of the Ohio Statehouse: a wish not to violate the Establishment Clause. That is the issue before this Court, despite Respondents best efforts to avoid it.

CONCLUSION

For the foregoing reasons and the reasons stated in Petitioners' initial brief, this Court should reverse the decision of the United States Court of Appeals for the Sixth Circuit.

BETTY D. MONTGOMERY
Ohio Attorney General

MICHAEL J. RENNER
Chief Counsel
(Counsel of Record)
CHRISTOPHER S. COOK
ANDREW S. BERGMAN
SIMON B. KARAS
Assistant Attorneys General
30 East Broad St., 17th Fl.
Columbus, Ohio 43215-3428
(614) 466-5026

Attorneys for Petitioners

April 10, 1995